

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

FRANKLIN MINT, CO.,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
RUSSELL BOYD d/b/a	:	
THEMINT.COM, and HEATHER	:	
HEFFINGTON,	:	
Defendants.	:	NO. 99-03823

M E M O R A N D U M

Newcomer, S.J.

November , 2000

I. BACKGROUND

The Court now imposes sanctions pursuant to Federal Rule of Civil Procedure 11 upon Marcia Allen-Phillips, attorney for defendants in the above captioned case, and Orders Allen-Phillips to show cause why she should not be held in contempt of this Court pursuant to 18 U.S.C. § 401.

Some time after June 14, 1999 and before July 22, 1999, defendant Russell Boyd began operating a web site with a domain name of "THEMINT.COM." Among information displayed on the website was a frequently asked questions page which included the question "Is it true that Mint employees are beaten in lieu of being paid?" Consequently, Franklin Mint filed this case on July 29, 1999 against defendant Russell Boyd to obtain the Internet domain name "THEMINT.COM." Franklin Mint alleged it was entitled to this domain name by virtue of its long standing ownership of its common law mark "1-800-THEMINT."

On August 5, 1999, one week after the complaint was filed, Boyd transferred his ownership of "THEMINT.COM" to Heather Heffington. Thus, on August 26, 1999, Franklin Mint filed its First Amended Complaint adding Heffington as a co-defendant. Ms. Heffington accepted service of copies of the amended complaint personally and on behalf of Boyd.

When both Boyd and Heffington initially failed to answer the complaint, the clerk entered a default against both defendants pursuant to Federal Rule of Procedure 55(a) on October 14, 1999. Thereafter, upon consideration of plaintiff's Motion for Default Judgment, this Court entered a default judgment as to both defendants on February 7, 2000.

On June 2, 2000, almost four months after this Court entered judgment in favor of plaintiffs, defendants Boyd and Heffington filed a Petition to Vacate Entry of Default Judgment. In the brief accompanying that Petition, Boyd claimed not to have been properly served with the Summons. However, the basis for Heffington's Petition was never clear, but oddly Heffington admitted to having been served with a complaint and summons. (See June 2, 2000 Petition to Vacate Default Judgment, at 2).

On July 20, 2000, upon review of defendants' Petition and plaintiff's opposition, this Court vacated its Order of default judgment against Boyd only, but not Heffington.

On September 12, 2000 Boyd finally answered plaintiff's

complaint and on September 21, 2000, this Court held a pre trial conference with counsel for plaintiff and Marcia Allen-Phillips, counsel for defendants Boyd and Heffington. In that conference, plaintiff's counsel expressed plaintiff's intention to voluntarily dismiss defendant Boyd from the action.¹ In light of plaintiff's representation, this Court assumed this case would soon be closed. However, Allen-Phillips suggested that the Court could not close the case because of Heffington. Ms. Allen-Phillips reason for keeping this case open was unclear even after several attempts by the Court to clarify her reasoning.² Thus, on October 4, 2000, the Court issued the following Order which stated inter alia:

If either party wishes to seek relief from this Court in the above captioned case, that party is ORDERED to submit an appropriate motion accompanied by a brief that details the history of this case, and precisely defines the nature of the relief sought within ten (10) days of the date of this Order.

Despite this Court's express requirement that the parties submit a Motion, Allen-Phillips, on behalf of Heffington, submitted a Notice of Petition to Vacate Entry of Default

¹Indeed, on October 16, 2000, plaintiff moved to voluntarily dismiss Boyd without prejudice, and on October 30, 2000 the Court dismissed Boyd accordingly.

²Both parties' counsel participated in the pre trial conference via telephone. During that conference, the Court repeatedly asked Allen-Phillips what relief Heffington sought from the Court, but Allen-Phillips failed to articulate the nature of the relief plaintiff sought.

Judgment Against Defendant Heather Heffington on October 16, 2000. Moreover, Allen-Phillips failed to define the procedural nature of Heffington's Notice; it was not a Motion, nor was it a Petition. Notwithstanding the procedural deficiency of defendants' Notice, it appeared plaintiff asked the Court to reconsider its July 26, 2000 Order denying Heffington's Petition to Vacate Default Judgment. Specifically, Allen-Phillips argued on behalf of plaintiff that Heffington was not served with a summons.

Because Allen-Phillips appeared to seek reconsideration of the Court's July 26, 2000 Order, this Court treated defendants' Notice as a Motion for Reconsideration. However, upon consideration of defendants' Notice as a Motion for Reconsideration, it became clear that defendants' motion was untimely, meritless and baseless. Thus, the Court denied the Motion, and Ordered Allen-Phillips to appear before the Court at 9:00 AM on November 8, 2000 to show cause why she should not be sanctioned under Federal Rule of Civil Procedure 11.³ Allen-Phillips failed to appear, failed to notify the Court that she would not appear, and, consequently, failed to show cause why she should not be sanctioned.

³In its October 30, 2000 Order denying defendants' Notice, the Court explained the reasons for its decision, and also outlined the bases for the Court's consideration of Rule 11 sanctions.

II. DISCUSSION

Under Rule 11, sanctions are appropriate when the "claim or motion is patently unmeritorious or frivolous." Dura Systems, Inc. v. Rothbury Invest., Ltd., 886 F.2d 551, 556 (3rd Cir. 1989) (quoting Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3rd Cir. 1988)). Rule 11 sanctions may also be appropriate where the allegations and other factual contentions do not have evidentiary support. See FED.R.CIV.P. 11(b)(3).

Here Allen-Phillips Notice of Petition appears meritless, frivolous and fails to provide evidentiary support for its allegations. First, she makes no effort to justify her grossly past due motion for reconsideration. Moreover, what has been filed is not in accordance with this Court's October 4, 2000 Order requiring the parties to submit "an appropriate motion." That Order makes no mention of a "Notice of Petition," and this Court is unaware of any Federal Rule of Civil Procedure that mentions a Notice of Petition as a procedural device.⁴ The Court specifically requested the parties' submit a motion, as opposed to something else, because Allen-Phillips failed to explain what she wanted the Court to resolve for her client, and a motion by

⁴Unsure of whether Allen-Phillips indeed sought some Court action on her Notice, the Court attempted to contact her at her office several times and left messages on her firm's answering machine. However, she failed to return any of the Court's phone calls.

definition is an application made to a court to obtain a rule or order directing some act to be done in favor of the applicant.

See BLACK'S LAW DICTIONARY 1013 (6th ed. 1990).⁵

Not only was the motion for reconsideration meritless because it was past due and in the improper form, the Notice of Petition has no basis in fact. The Petition alleges that the default judgment against Heffington should be vacated because Heffington did not receive a summons with her complaint. However, in her first Petition to Vacate filed on June 2, 2000, Allen-Phillips admits Heffington did receive a copy of the complaint and summons. (See June 2, 2000 Petition to Vacate Default Judgment, at 2). Unbelievably, Allen-Phillips makes the exact same admission within the Notice the Court now considers. (See October 16, 2000 Notice of Petition to Vacate Default Judgment, at 3).⁶

Perhaps the most wasteful failure committed by Allen-Phillips is her submission of an unsigned affidavit from

⁵Instead of motioning the Court for action, Heffington's Notice of Petition merely notified this Court that on a certain unspecified date, defendant Heffington "shall move before this Court for an Order to Vacate Default Judgment." (October 16, 2000 Notice of Petition to Vacate Default Judgment, at 1). Thus, even if defendant's Notice were not construed as a motion for reconsideration, any motion that followed defendant's October 16, 2000 Notice would be an untimely violation of this Court's October 4, 2000 Order.

⁶It seems Allen-Phillips did nothing more than cut and paste this portion, and most other portions, of her October 16, 2000 Notice from her June 2, 2000 Petition.

Heffington which alleged that Heffington did "not recall receiving a Summons." The Court first notes that simply because a party does not recall receiving a summons does not mean they did not receive a summons—which is the bases for the Notice. Further, not only was this unsigned affidavit submitted, but to date, Allen-Phillips has made no effort to correct her filing of the affidavit. Courts have sanctioned an attorney for nothing more than submitting an unsigned affidavit, and for then failing to rectify the improper filing. See, e.g., In re Westin Capital Markets, Inc., 184 B.R. 109, 125 (Bankr.D.Or. 1995).

In this case, the Court has more than ample grounds to sanction Allen-Phillips in accordance with Rule 11, and will sanction her appropriately. "The appropriate sanction is one which 'is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.'" FED.R.CIV.P. 11(c)(2)); see also Doering v. Union County Bd. of Chosen Freeholders, 857 F.2d 191, 194 (3rd Cir. 1988). "The sanction may consist of, or include, directives of a nonmonetary nature, or an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation." FED.R.CIV.P. 11(c)(2).

Thus, "what is 'appropriate' may be a warm-friendly

discussion on the record, a hard-nosed reprimand in open court, compulsory legal education, monetary sanctions, or other measures appropriate to circumstances." Langer v. Monarch Life Ins. Co., 966 F.2d 786, 810 (3rd Cir. 1992). Most importantly, in determining the appropriate sanction to impose, the court should consider "the particular facts of [the] case," Lieb, 788 F.2d at 158, and "utilize the sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such purpose." Langer, 966 F.2d at 810.

Thus, in accordance with Federal Rule of Civil Procedure 11(b), and the Third Circuit law explained above, this Court sanctions Allen-Phillips and shall Order her to pay \$1000.00 into the Court. The Court finds that such a sanction, based upon the facts of this case, properly deters the type of misconduct present here.

Sadly though, the Court's admonishment of Allen-Phillips cannot end here. When Allen-Phillips failed to appear for her show cause hearing on November 8, 2000, she may have been in contempt of Court pursuant to 18 U.S.C. § 401, and Rule 42(b) of the Federal Rules of Criminal Procedure.⁷

⁷ Rule 42 Criminal Contempt

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for

Title 18 U.S.C. § 401 provides:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as-

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command

18 U.S.C. § 401.

On October 30, 2000 this Court Ordered Allen-Phillips to appear before the Court on November 8, 2000 to show cause why she should not be sanctioned under Rule 11. Allen-Phillips failed to appear at that time, failed to appear on that day, and failed to notify the Court that she was unable to appear.

Criminal contempt sentences are punitive in nature and intended to vindicate the authority of the court. See United States v. United Mine Workers of America, 330 U.S. 258, 303 (1947).

Indeed, "the interests of orderly government demand that respect

the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest.

FED.R.CRIM.P. 42(b).

and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril." Id.

It appears clear that Allen-Phillips disobeyed the Court's October 30, 2000 Order, and therefore may be guilty of contempt pursuant to 18 U.S.C. § 401.⁸ The Court is presently of the opinion that it has grounds to hold Allen-Phillips in contempt,⁹ see In re Gates, 478 F.2d 998 (D.C.Cir. 1973); In re Niblack, 476 F.2d 930 (D.C.Cir. 1973), cert. denied, 414 U.S. 909, (1973) (finding a lawyer who was nearly two hours late to a hearing subject to summary contempt), but wishes to provide Allen-Phillips with an opportunity to be heard on the issue.

Accordingly, the Court shall issue an Order requiring

⁸The Court notes here that this Court found Allen-Phillips in summary contempt on the record and in open court pursuant to FED.R.CRIM.P. 42(a) during the November 8, 2000 hearing that Allen-Phillips failed to attend. However, upon further consideration, the Court now vacates that oral ruling and will Order Allen-Phillips to show cause why she should not be held in contempt.

⁹Additionally, this is not the first time Allen-Phillips violated an Order issued by this Court. As explained above, Allen-Phillips violated this Court's October 4, 2000 Order when she filed her Notice of Petition as opposed to a motion.

Allen-Phillips to show cause why she should not be held in contempt.

An appropriate Order will follow.

Clarence C. Newcomer, S.J.